UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

INCLINATOR COMPANY OF AMERICA[1]

Employer

and Case 6-RD-1400

JOHN WILLIAM TERRY, JR.

Petitioner

and

DISTRICT LODGE 98, INTERNATIONAL
ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO[2]

Union

DECISION AND ORDER AND FURTHER ORDER REVOKING CERTIFICATION IN CASE 4-RC-19081

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before David L. Shepley, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.[3]

Upon the entire record[4] in this case, the Regional Director finds:

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[1] The name of the Employer appears as amended at the hearing.

[2] The name of the Union appears as amended at the hearing.

[3] Under the provisions of Section l02.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, l099 l4th St., NW., Washington, D.C. 20570-000l. This request must be received by the Board in Washington by September 29, 1999.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(I) and Section 2(6) and (7) of the Act.[5]

As amended at the hearing, the Petitioner, an employee of the Employer, seeks a decertification election in a unit of all service and installation employees; excluding all other employees, including production and maintenance employees, office clerical employees, sales employees, guards and supervisors as defined in the Act (hereinafter "the unit"). Although the parties are in accord as to the scope of the unit, the Petitioner and the Employer, contrary to the Union, would exclude employee Terry Hoch from the unit on the ground that Hoch has been permanently laid off, and has no reasonable expectancy of recall. Further, in the event that Hoch is determined to be ineligible to vote in a decertification election, the Union, contrary to the Petitioner and the Employer, asserts that the petition should be dismissed on the ground that Hoch's exclusion from the unit renders it a permanent one-person unit, based upon which no election could be conducted. In addition to Hoch, whose eligibility is in issue herein, there is one other individual, the Petitioner herein, employed in the unit.

[4] The Employer and the Union filed timely briefs which have been duly considered by the undersigned. The Petitioner did not file a brief.

[5] Notwithstanding the fact that the parties entered into a stipulation at the hearing stating that a question concerning representation exists in this matter, for the reasons set forth herein, I find that the record evidence supports a contrary conclusion.

The Employer, a Pennsylvania corporation with an office located in Harrisburg, Pennsylvania, is engaged in the assembly and installation of elevators. Stephen Nock serves as the Employer's president and CEO, and is responsible for the overall operation of the business.

The Union was certified as the collective-bargaining representative of the unit on April 28, 1997, in Case 4-RC-19081. Since that time, as stipulated at the hearing, the Union has acted as a "servicing facilitator" for its affiliated local union, Local Lodge 2367 (hereinafter "Local 2367"), for purposes of collective bargaining with the Employer.[6] Local 2367 and the Employer are parties to a collective-bargaining agreement, the effective dates of which are March 19, 1998 to October 7, 1999. Local 2367 and the Employer maintain a separate contract with respect to the Employer's production and maintenance employees.

The Voting Eligibility of Terry Hoch

As previously indicated, the Petitioner and the Employer, contrary to the Union, contend that unit employee Hoch is ineligible to vote in a decertification election because he has been laid off and has no reasonable expectancy of recall. The Union disputes Hoch's status as a laid off employee, asserting instead that Hoch has been unavailable for work due to a medical leave of absence, and that he is therefore eligible to vote in any election that may be directed herein.

The Board has held that employees who are on sick or disability leave are presumed eligible to vote absent an affirmative showing that the employee has resigned or been discharged. Vanalco, Inc., 315 NLRB 618 (1994), citing Red Arrow Freight Lines, Inc., 278 NLRB 965 (1986). See also Thorn Americas, Inc., 314 NLRB 943 (1994). Additionally, the Board has found that employees who are laid off are presumed eligible to vote unless it is determined that they have no reasonable expectancy of recall in the foreseeable future. Vanalco, Inc., supra; Higgins, Inc., 111 NLRB 797 (1955). See also Osram Sylvania, Inc., 325

[6] The parties further stipulated at the hearing that Local 2367 is a "labor organization" within the meaning of the Act.

NLRB No. 147 (1998) (laid off employees found ineligible to vote despite recall prior to election, where they had no reasonable expectancy of recall on payroll eligibility date).

The record evidence establishes that Hoch was working for the Employer as an installer in the fall of 1998, but that he was frequently absent from work, for reasons that the Employer believed were related to illness.[7] On several occasions in about the fall of 1998, CEO Nock spoke with the Union's Business Representative, Thomas Santone, concerning Hoch's excessive absenteeism and its effect on the Employer's ability to complete installation work for its customers. During these conversations, on dates uncertain in the autumn of 1998, Santone and Nock discussed the Employer's desire to subcontract the installation work that Hoch had been hired to perform, in order to meet the customers' needs.

By letter dated November 18, 1998, signed by CEO Nock, the Employer advised Hoch that he was being laid off, effective November 19, 1998. The Employer also informed Hoch that it would not contest his eligibility for unemployment compensation benefits and that Hoch's Blue Cross and Blue Shield insurance coverage had been paid through November 30, 1998. Finally, the Employer enclosed with the letter Hoch's "final check" which included "final pay, vacation, and prorata vacation." Nock testified that he sent a copy of this letter to Santone, although Santone testified that he did not recall having received this letter.

On that same date, November 18, 1998, the Employer, by Nock, sent a separate letter to Santone, seeking to confirm their prior discussions with respect to the installation work and Hoch's recall rights. Specifically, Nock recounted the parties' previous conversations concerning the Employer's desire to subcontract the work and the Employer's intent to retain the remaining installer, the Petitioner herein, for the performance of repair work. In concluding this

[7] Notably, none of the parties called Hoch as a witness to testify at the hearing. Nor was any documentary evidence introduced pertaining to Hoch's medical status, rendering it impossible to reach any conclusions about Hoch's actual medical condition.

confirming letter, Nock noted that he and Santone had agreed to provide Hoch with recall rights for a period of six months.

Santone testified that he received the letter that Nock had sent directly to him on November 18, 1998, and that he subsequently returned the letter to Nock during a meeting they held on about January 12, 1999, because he disagreed with the contents and because it had been Santone's understanding that his prior conversations with Nock about Hoch's layoff and recall rights were "off the record." Nock similarly testified that when Santone returned the November 18, 1998 letter, Santone stated that he did not want a written record of their conversations about Hoch.

With respect to Hoch's medical status, Santone testified that on a date uncertain in about November 1998, apparently after Hoch received the Employer's layoff notice, Hoch telephoned Santone, advised Santone that he was out of work because of a medical condition and asked Santone how the Employer could lay him off when he was on medical leave. Santone then contacted Nock and advised Nock that Hoch was out of work on medical disability leave, which was immediately disputed by the Employer. Santone told Nock that the Union did not believe the Employer could lay off Hoch while he was on medical leave. Nock testified that he advised Santone that Hoch would remain on layoff status, but that if Hoch presented information concerning his medical condition, the Employer would institute the layoff at the conclusion of any contractual disability period for which Hoch might be eligible.

In support of its contention that Hoch was actually on medical leave and could not, therefore, be laid off, the Union relies on Appendix B of the parties' collective-bargaining agreement, which provides that the maximum period of indemnity for employees' insurance coverage is twenty-six weeks. The Union additionally relies on Article XIV, subsection C, of the contract, entitled, "Leave of Absence or Resignation," which states that in the event of illness or accident, the Employer will grant a leave of absence without pay to employees where "medical evidence satisfactory to the employer is submitted." Such leave is not to exceed the length of

time that the employee has worked for the Employer, or twelve months. Arguing that Hoch was on medical leave as of November 18, 1998, that he was initially entitled to twenty-six weeks of indemnity insurance benefits, and that he was thereafter entitled to a medical leave of absence through November 18, 1999, the Union asserts that Hoch must be allowed to vote.

Notwithstanding Santone's testimony that he had advised the Employer of Hoch's illness, the record is utterly devoid of any evidence establishing that Hoch had either applied for, or received, medical leave of any sort. Indeed, there is no evidence that Hoch ever submitted the medical information required by the very text of the contractual provision upon which the Union relies or that he ever received any weekly indemnity insurance benefits. While it admittedly knew of the Employer's layoff notice to Hoch, the Union neither grieved the Employer's action nor filed an unfair labor practice charge concerning that action. Absent any documentary evidence to support the Union's assertion that Hoch was on medical leave,[8] and noting the record evidence that Hoch was laid off by the Employer effective November 19, 1998, I cannot conclude that Hoch's separation from employment with the Employer was due to any sort of medical leave of absence.

The record affirmatively discloses that Hoch was separated from the company by reason of layoff. In this regard, it is noted that the Employer's letter to Hoch of November 18, 1998 is the only documentary evidence regarding Hoch's employment status with the Employer. The letter specifically sets forth the Employer's intent to sever its employment relationship with Hoch, as indicated by reference to Hoch's "final pay" and the termination of his insurance benefits.

The Board has frequently addressed the eligibility of laid off employees to vote in a representation election and, in so doing, has consistently applied the "reasonable expectancy of recall" test to determine voter eligibility. Vanalco, Inc., supra, and Higgins, Inc., supra. In evaluating whether a reasonable expectancy of recall exists for laid off employees, the Board

[8] As noted, Hoch was not called as a witness by either party.

considers such objective factors as the employer's past experience with respect to layoffs; the employer's future plans; and the circumstances surrounding the layoff, including what the employer told laid off employees about the likelihood of recall. Apex Paper Box Co., et al., 302 NLRB 67 (1991); S. & G. Concrete Co., 274 NLRB 895 (1985); and D. H. Farms Co., 206 NLRB 111 (1973). Moreover, a reasonable expectancy of recall cannot be established by vague statements regarding a chance or possibility of recall, absent further evidentiary support. Tomadur, Inc., 196 NLRB 706 (1972).

Initially, the record yields no guidance from the Employer's past experience with layoffs, as Nock testified that the Employer has never laid off any other employees. With respect to the Employer's future plans, as described more fully below, the record contains testimony reflecting the Employer's desire to reinstate the installation portion of its operations at some indefinite time in the future. Nevertheless, there is no evidence that the Employer ever contemplated including Hoch in any potential plans it might have to return to the installation business, or otherwise considered recalling him for any purpose.[9]

Finally, it cannot be concluded from the circumstances surrounding the layoff that Hoch had any reasonable expectancy of recall. The record indicates that the Employer laid off Hoch because, in the Employer's view, Hoch's excessive absenteeism adversely affected the business. The Employer's layoff notice to Hoch, unchallenged by the Union through the grievance procedure, features a tone of finality, as it references the termination of Hoch's insurance coverage and the Employer's final payments to him for wages and vacation benefits. Hoch's recall rights, described in the Employer's November 18, 1998 correspondence with the Union regarding Hoch as being effective for six months from November 19, 1998, expired prior to the filing of the petition in this matter. Finally, the work that Hoch previously performed was

[9] To the contrary, in testifying about his conversations with CEO Nock regarding Hoch's employment status, Union representative Santone stated that the parties were "hoping" that Hoch "would just go away."

assumed by subcontractors upon Hoch's layoff, with no record indication that the Employer ever intended to release the subcontractors in order to recall Hoch to service.

Based on the foregoing, and the record as a whole, I find that Hoch does not have a reasonable expectancy of recall to employment with the Employer, and he is, therefore, ineligible to vote.

The Size of the Unit and Appropriateness of the Petition

Having concluded that Hoch is no longer employed in the unit, the question arises whether the unit has been permanently reduced to a one-person unit, so as to warrant dismissal of the petition and revocation of the Union's certification. As previously indicated, the Union asserts that Hoch's exclusion from the unit, combined with the Employer's indefinite plans to replace Hoch, results in a one-person unit that consists only of the Petitioner and requires dismissal of the petition. By contrast, the Employer argues that the current one-person status of the unit is temporary in nature, inasmuch as the Employer intends to expand the installation portion of its business sometime in the future.

The Board has long recognized that the Act does not empower it to certify a unit consisting of a single employee. Luckenbach Steamship Company, Inc., 2 NLRB 181, 193 (1936). Further, in deciding whether a bargaining unit consists of only one employee, the Board has held that it is the permanent size of the unit that is controlling, not the number of actual incumbents employed at any given point in time. Patrick H. Dulin d/b/a Copier Care Plus, 324 NLRB 785 (1997). See also Roman Catholic Orphan Asylum d/b/a Mount St. Joseph's Home for Girls, 229 NLRB 251 (1977) (Board dismissed a petition in a one-person unit of social workers, as the employer therein did not "intend to employ more than one such social worker at a given time").

The record evidence in the case at hand fully establishes that when the Employer terminated Hoch's employment by laying him off in November 1998, the Petitioner herein became the sole installer employed in the unit. Indeed, CEO Nock testified that there was only

one person in the unit as of the date of the hearing in this matter and that Hoch's position had been vacant for the preceding eight months. Moreover, it is undisputed that from the time of Hoch's layoff until the present, the Employer has utilized subcontractors to perform much of the installation work previously performed by Hoch. Still other portions of the installation work have been performed by production and maintenance bargaining unit employees, with the approval of the Union.

In support of its contention that the installer unit has not been permanently reduced to a one-person unit, the Employer points to evidence that Nock previously advised the Union that the Employer did not intend to "get out of" the installation business permanently. Nock also told the Petitioner, on a date uncertain in about August 1999, that "there would be a possibility" that the Employer would fill the position previously occupied by Hoch, and he testified that the Employer would "probably" hire an installer within the next six months. According to Nock, the Employer has a "strategic plan," as directed by its Board of Directors, to once more "get into the business" of installation work.

Notwithstanding Nock's testimony regarding the possibility of adding installers to the unit, the record evidence is devoid of any documentation showing that the Employer in fact intends to continue its installation work by hiring new employees. To the contrary, the record unequivocally establishes that the Employer has not posted any job notices for installer positions, as would be required by the contract, or even notified the Union of an intent to post such notices. Indeed, as CEO Nock testified, the Employer did not plan to hire an installer during the week of the hearing in this matter, or in the week thereafter, or even the following month, saying that he could not "foretell the future." Nock further testified that he had not reviewed any employment applications for new installers because "we haven't made the decision to hire someone yet."

In light of the foregoing, and noting particularly that the Employer has taken no steps to fill the installer vacancy, but has chosen to subcontract the work instead, I find that any

expansion of the installer unit beyond its current one-person size is merely speculative. Absent any affirmative evidence that the Employer has actual plans to hire an installer in the identifiable future, it appears that the one-person installer unit, in existence for over eight months,[10] is permanent in nature. Inasmuch as no certification may be issued in a one-person unit, I shall therefore dismiss the instant petition and revoke the Union's certification. See Sonoma-Marin Publishing Company, 172 NLRB 625 (1968).

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

IT IS HEREBY FURTHER ORDERED, based on a finding that the certified unit has been permanently reduced to one person, that the certification of representative previously issued in Case 4-RC-19081 be, and it hereby is, revoked.

Dated at Pittsburgh, Pennsylvania, this 15th day of September 1999.

/s/Gerald Kobell
Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
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[10] In its brief, the Employer argues that the period of time for which the unit has been limited to a single employee is actually two months, given Hoch's six-month recall period. This argument is unpersuasive, however, where there is no evidence that the Employer has taken any affirmative steps to otherwise expand the unit, regardless of Hoch's recall rights.